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No. 90-1173

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

PUBLIC SERVICE COMPANY OF COLORADO
and R. M. RICHARDS,
Petitioners,

v.

WILLARD A. THOMPSON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Petitioners, Public Service Company of Colorado, and R. M. Richards submit this Reply Brief in support of their Petition for Writ of Certiorari.

INTRODUCTION

Pursuant to the terms set forth in Supreme Court Rule 15, Petitioners may address arguments first raised in the brief in opposition. The Respondent's opposition makes several significant misstatements of fact as well as of law which require a response.

FACTUAL MISSTATEMENTS

No matter what the facts of a particular case, the issue that calls for review and uniformity here is whether statements made in disciplinary letters by employers to their employees pursuant to a collective bargaining agree-

ment are absolutely privileged or are subject to only a qualified privilege. Respondent spends a substantial amount of his brief in opposition recounting his allegations (Respondent's Brief, pp. 3-11), many of which do not satisfy the requirement of personal knowledge necessary to oppose a Motion for Summary Judgment in accordance with Colorado Rule of Civil Procedure 56(e).[1]

Two factual allegations are so egregious as to require Petitioners to respond at this juncture. The first is the allegation that the disciplinary notice which charged Respondent with sexual harassment was published to persons outside the Company (Respondent's Brief, pp. 3, 8). This precise issue was squarely before the Colorado Court of Appeals, and it found:

> Here, PSC limited the publication of the notices to plaintiff and his collective bargaining agent, its labor relations staff, and supervisors who would become involved in the grievance proceedings if plaintiff elected to invoke those procedures . . . . [T]he absolute privilege that the national labor policy requires to be recognized was not abused here. (Petition for a Writ of Certiorari, Appendix B, pp. 26a-27a).

Neither the Colorado Supreme Court nor the Colorado Court of Appeals found that the disciplinary notices had been published beyond the proper group so as to amount to an abuse of the privilege. Respondent's allegations to the contrary do not constitute "competent evidence." (Petition for a Writ of Certiorari, Appendix B, p. 21a).

Second, Respondent's allegation that his retirement was involuntary (Respondent's Brief, pp. 8-9) is totally unsupported and irrelevant in any event. Plaintiff's Complaint was filed in 1984, and it contained no allegations relating to his retirement. Nor was this complaint ever amended. Further, as is evidenced by sworn testimony in the record below, Petitioner, R. M. Richards was the

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[1] Colorado Rule of Civil Procedure 56(e) is virtually identical to Federal Rule of Civil Procedure 56(e).

Respondent's supervisor only through March, 1985. Therefore, when Respondent retired in 1986, Petitioner Richards was no longer his supervisor. Respondent voluntarily availed himself of a company-wide early retirement program.

ARGUMENT

Respondent asserts that "state cases relied upon by the Petitioners have no relevance here." (Respondent's Brief, p. 14). Respondent further states, "The state courts have looked at the qualified privilege, the unqualified privilege, and no privilege at all principles in defamatory cases in different ways, which is how our system functions." *Id.* The Respondent concludes, "There is no way this Court can track all of the state courts and try, in effect, *to codify the law when a federal question is involved. . . .*" *Id.* (Emphasis added). Such an assertion is directly contrary to basic principles of pre-emption and the pronouncements of this Court. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 543 (1977) (state law which prevents the accomplishment and execution of the full purposes and objectives of Congress is impermissible, and the state law must yield to the federal). It is exactly because a federal question concerning federal labor policy is involved that the Court must review this case to establish a uniform federal rule.

Contrary to the general contention of the Respondent, the Labor Management Relations Act authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). In fact, this Court stated that the authorization conferred by the Act includes the ability to order "specific performance of promises to arbitrate grievances . . ." *Textile Workers v. Lincoln Mills*, 353 U.S. at 451. Surely, the power of the federal courts to order specific performance of a promise to arbitrate grievances includes the power and authority

to determine the proper degree of protection for statements made in conjunction with those grievance and arbitration proceedings.

Congress has stated at 29 U.S.C. § 171(a) that the policy of the United States is that the settlement of issues between employers and employees can most satisfactorily be secured through the processes of conference and collective bargaining between employers and the representatives of the employees. Hence, pursuant to congressional direction and *Lincoln Mills*, federal labor policy necessarily requires a uniform federal application of an absolute privilege for statements made in disciplinary notices which are required pursuant to a collective bargaining agreement. Presently, the degree of privilege which is afforded to statements made in such disciplinary notices depends upon the jurisdiction in which the matter is at issue. This is an intolerable situation for employees, unions and employers, many of which operate on a national scope. A uniform standard is required.

The Respondent spends some time arguing that this case is not preempted pursuant to *Lingle v. Norge Division*, 486 U.S. 399 (1988), because no interpretation of the collective bargaining agreement is necessary. (Respondent's Brief, pp. 12-15). Petitioners do not contend that a detailed review of the collective bargaining agreement is required. (Petition for a Writ of Certiorari, pp. 9-10). However, the existence of the federal question involving what degree of privilege is afforded to disciplinary notices in order to preserve a free flow of information in the disciplinary and grievance process requires this Court to address this issue.

Also, the Respondent points out that the entire collective bargaining agreement was not made a part of the record below. As stated above, the particular terms of the collective bargaining agreement are not relevant for the determination of this issue of a uniform federal policy. What is important is that through the doctrine of

past practice, the collective bargaining agreement required that written disciplinary notices (the subject of the libel action here) be generated and provided to Respondent's collective bargaining agent, the Union. In that regard, there is ample evidence in the record below, provided by affidavit, of the requirements of the collective bargaining agreement. This has gone unchallenged by the Respondent.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Supreme Court of the State of Colorado.

Respectfully submitted,

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